77-1128

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-5151
77-5152

THOMAS BIGGS GRIFFIN, III and
ANTOINETTE LOUISE GRIFFIN
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners, Thomas Griffin and Antoinette Griffin, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on November 7, 1977.

OPINIONS BELOW

The District Court Order of May 20, 1976 denying the pre-trial Motion to Suppress Evidence is attached as Appendix A. The Orders of the United States Court of Appeals for the Sixth Circuit affirming the judgment of conviction and denying a Petition for Rehearing En Banc are attached as Appendix B and C respectively. The opinions for the Court of Appeals are unreported. The District Court Opinion is reported at 413 F. Supp. 178 (Ed. Mich. 1976).

JURISDICTION

The Order of the Court of Appeals affirming judgment was entered November 7, 1977. The Petition for Rehearing was denied on December 12, 1977. A Petition for Extension of Time for Filing a Petition for Writ of Certiorari was filed and granted by Justice Potter Stewart on January 10, 1978. This Petition for Certiorari is filed within the time allowed by the extension. This Court's jurisdiction is invoked under 28 USC §1254(1).

QUESTION PRESENTED FOR REVIEW

1. Whether Petitioners' right against unreasonable search and seizure was violated by a warrantless search of Petitioners' luggage and automobile where both the luggage and the automobile were in the exclusive possession and control of DEA agents, where no exigent circumstances existed, and where there was no probable cause to arrest the woman claiming the luggage or the driver of the automobile.

STATEMENT OF FACTS

The facts of the case were developed in a pre-trial evidentiary hearing on Motions to Suppress Evidence and at trial.

On June 12, 1975, Antoinette Griffin flew from Detroit Metropolitan Airport to Los Angeles. Based on information from airport personnel that Ms. Griffin appeared to be carrying a large sum of money, DEA agent Paul Markonni located Ms. Griffin in the American Airlines satellite. Noting that she was then in possession of a gold tote bag and a folding garment bag, he continued to observe her until her departure.

Markonni contacted officers in Los Angeles and requested that surveillance be continued after Ms. Griffin's arrival. Officers observed Ms. Griffin leave the Los Angeles airport with a man allegedly known to them as a narcotics dealer. Markonni was informed of this and that the officers were unsuccessful in following Ms. Griffin.

On June 15, 1975, Ms. Griffin flew back to Detroit. With advance notice of her return flight, Agent Markonni established surveillance in the deplaning area along with other officers. Ms. Griffin was met at the jet way by Thomas Griffin. After a brief embrace and some conversation, Ms. Griffin proceeded to the women's restroom. Another woman, later identified as Linda Jackson, entered the restroom after Ms. Griffin, remained several minutes and left just prior to Ms. Griffin. Ms. Jackson was then observed walking toward the baggage claim area; the Griffins followed at some distance.

At that point, agents lost sight of Ms. Jackson; when next seen, she had entered the baggage claim area and was seated. The Griffins were, meanwhile, seated in an adjacent lounge area.

Agent Markonni next observed a sky cap with a baggage claim ticket go to the baggage belt and remove a gold garment bag similar to the bag previously carried by Antoinette Griffin. The skycap placed the bag on his cart and began conversing with Ms. Jackson. Markonni testified that he had not seen Ms. Jackson deplane and, further, that he watched the luggage conveyor belt for some time, determining that there was only one gold garment bag among the pieces of luggage removed from the Los Angeles flight.

A second officer was left to continue the surveillance of Linda Jackson, while Markonni, with Officer Cary, followed the Griffins out of the terminal. Markonni and Cary observed the Griffins enter Thomas Griffin's automobile and start to drive away. The two officers drew their guns, ordered Thomas Griffin to stop the car, and placed both Griffins under arrest. The automobile was locked and left in the street in front of the terminal.

With the Griffins, Markonni reentered the terminal and returned to the baggage claim area. He then seized the garment bag from the sky cap's cart, identified himself to Linda Jackson, and asked the sky cap where he got the baggage claim for the bag. The sky cap indicated Ms. Jackson, whereupon all three, Ms. Jackson, Antoinette Griffin and Thomas Griffin were led to a separate room in the terminal. Markonni read Miranda warnings and then asked to whom the bag belonged. Receiving no response, Markonni opened and searched the bag, seizing a quantity of suspected heroin and cocaine.

At some point, Thomas Griffin's automobile was moved from the street to a private, employees' parking lot. More than a half hour after the Griffins' arrest, the car was searched, in the parking lot, by Special Agent Seward who was called to the airport specifically for that purpose. Inside the car, he discovered a wallet, a firearm, and an unlocked white Samsonite cosmetic case. Seward opened both, seizing suspected narcotics from each.

Following denial of their Motion to Suppress by the District Court, Thomas Griffin, Antoinette Griffin and Linda Jackson were tried by a federal jury — only the Griffins were convicted.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW WHICH UPHOLDS THE WARRANTLESS SEARCH OF PETITIONER'S GARMENT BAG, AND A SUITCASE AND WALLET SEIZED FROM PETITIONER'S AUTOMOBILE IS IN DIRECT CONFLICT WITH AN APPLICABLE DECISION OF THIS COURT.

In its Order denying Petitioners' Motion to Suppress, the District Court relied heavily on *United States* v *Kaye*, 492 F2d 744 (6th Cir., 1974), to support its finding that Antoinette Griffin's garment bag was properly searched incident to the valid arrest of Linda Jackson. The District Court also found that the warrantless search of the automobile, and the suitcase and wallet found therein, was supportable as a search incident to the valid arrest of Antoinette Griffin, a passenger, or under the automobile exception, even though the Court found no probable cause for the arrest of Thomas Griffin, the owner and driver of the automobile.

a) The garment bag.

The arrest of Linda Jackson was unlawful and, therefore, a search incident to that arrest must be suppressed. The arresting officer knew 1) that Linda Jackson did not arrive on the Los Angeles flight and 2) that she was in the restroom at the same time as Antoinette Griffin; he believed that the garment bag claimed by her was the same bag he had previously seen in the possession of Antoinette Griffin. These factors are insufficient to establish probable cause that a crime had been or was being committed by Ms. Jackson.

Whether or not the arrest of Ms. Jackson was valid, this Court stated in *United States* v *Chadwick*, 97 S. Ct. 2476 (1977):

> "Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest." *Id*. at 2485

Antoinette Griffin's garment bag was seized from a sky cap by Agent Markonni, in the presence of several other officers, either before or contemporaneous with the arrest of co-defendant Linda Jackson. The bag was never in the actual possession of Ms. Jackson and was clearly reduced to the exclusive custody of Agent Markonni after the seizure. The government did not claim that Ms. Jackson attempted to gain access to the bag or that officers believed the bag contained weapons.

In its panel opinion, the Court of Appeals for the Sixth Circuit dismissed Petitioners' contention in a single line:

"The Court also properly admitted the contents of the gold folding bag seized in the baggage claim area."

Totally ignoring *Chadwick*, the panel opinion upheld the District Court opinion which clearly stated that the search would be upheld as incident to a valid arrest. *United States* v *Kaye*, 492 F.2d 744 (6th Cir., 1974), upon which the District Court relied, is inconsistent with the unambiguous language of a United States Supreme Court opinion, *Chadwick, supra*. Consequently, the Sixth Circuit is now in the position of upholding a search under an exception to that warrant requirement which is no longer recognized by the Supreme Court as an exception under the circumstances of the case at bar.

b) The suitcase and wallet seized from the automobile.

Inside Petitioner's automobile, Agent James Seward discovered, and immediately searched, an overnight case and a wallet. *Chadwick* applies specifically to the search of luggage or other personal property found inside an automobile where the automobile and its contents are in the complete control of the arresting officer. Even if the search of the automobile is upheld, the search of the wallet and overnight case was unlawful since no warrant was obtained. The decision below is contrary to the principles set forth in *United States* v *Chadwick, supra*.

2. THE DECISION BELOW AS TO THE LUGGAGE SEARCH IS INCONSISTENT WITH THE DECISION OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND CREATES A CONFLICT AMONG THE CIRCUITS.

A recent decision of the Court of Appeals for the Seventh Circuit, *United States* v *Berry*, slip opinion, (docket nos. 76-2014, 2037 and 2038) (8/24/77), reversed and remanded that case to the District Court for further hearings in light of *United States* v *Chadwick*, 97 S. Ct. 2476 (1977), which was decided subsequent to oral argument. The Seventh Circuit expressed its opinion that *Chadwick* altered the law of warrantless searches of items seized from the arrestee.

No material difference exists between the search of defendant's attache case in *Berry*, *supra*, and the search of Petitioner's garment bag.

The decisions of the Sixth and Seventh Circuits which apply the holding of *Chadwick*, *supra*, are inconsistent and create irreconcilable conflict in Fourth Amendment law.

3. THE DECISION BELOW INCORRECTLY APPLIES PREVIOUS DECISIONS OF THE COURT BY EXTENDING THE AUTOMOBILE EXCEPTION TO JUSTIFY A WARRANTLESS SEARCH OF AN AUTOMOBILE WHERE THERE WAS NO PROBABLE CAUSE AND WHERE NO EXIGENT CIRCUMSTANCES EXISTED.

Once an accused is under arrest and in custody, then a warrantless search made at another place, not contemporaneous with the arrest, is not incident to arrest. *Chambers* v. *Maroney*, 399 US 42 (1970).

The search of Thomas Griffin's automobile cannot be sustained as incident to his arrest since the District Court found no probable cause for his arrest.

Further the automobile was moved to an employees' parking lot and locked; the search did not occur for more than one half hour after Petitioners' arrest. The search was not *incident* to the arrest of Antoinette Griffin.

Nor was there probable cause to believe that the automobile contained contraband, except that Agent Markonni, who suspected Petitioners of transporting narcotics, allowed Petitioners to enter the automobile immediately prior to making the arrest. A pretext for an investigatory search was created here where there was no independent probable cause to search the automobile.

The decision below unreasonably applied the automobile exception to warrantless searches in a manner contrary to previous decisions of the Supreme Court.

CONCLUSION

For these reasons, a Writ of Certiorari should be issued.

Respectfully submitted,

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January 28, 1978

APPENDIX A

ORDER DENYING MOTIONS TO SUPPRESS

(In the United States District Court
For the Eastern District of Michigan, Southern Division)

United States of America, Plaintiff, v. Antoinette Louise Griffin, Thomas Biggs Griffin III, and Linda Rue Jackson, Defendants. Criminal No. 75-81026.

At a session of said court held in the Federal Building and U.S. Courthouse, Detroit, Michigan, on May 20, 1976.

Present: Honorable James P. Churchill, United States District Judge.

For the reasons set forth in a Memorandum Opinion of the Court entered on this date;

IT IS ORDERED that the defendants' motions to suppress be and hereby are DENIED.

/s/ James P. Churchill
United States District Judge

MEMORANDUM OPINION

(In the United States District Court
For the Eastern District of Michigan, Southern Division)

United States of America, Plaintiff, v. Antoinette Louise Griffin, Thomas Biggs Griffin III, and Linda Rue Jackson, Defendants. Criminal No. 75-81026.

On July 23, 1975, a seven-count indictment was returned in this case. In two counts of that indictment, all three defendants, Antoinette Griffin, Thomas Griffin, and Linda Jackson, were charged with possessing heroin and cocaine with intent to distribute.[1] In the remaining counts, defendant Thomas Griffin was charged with possession of heroin and cocaine with intent to distribute, carrying a firearm during the commission of a felony,[2] and being a convicted felon in possession of a firearm.[3] All three defendants filed motions for the suppression of evidence. An evidentiary hearing was conducted on the motions to suppress, and the Court made certain findings of fact and law, reserving final decision on the motions for further study.

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[1] 21 U.S.C. §841(a) (1); 18 U.S.C. §2.

[2] 18 U.S.C. §924(c) (2).

[3] 18 U.S.C. §1202(a) (1).

The sequence of events leading to the arrest of the three defendants and the seizure of the evidence sought to be suppressed was found on the record to have occurred as follows. Defendant Antoinette Griffin, in possession of an airplane ticket, went through the security gate at Detroit Metropolitan Airport with two suitcases, which were scanned by the X-ray machine. The X-ray picture disclosed an "unidentified mass" in one of the bags. The security guard opened the bag and identified the mass as an estimated $20,000 in U.S. currency. She immediately contacted Special Agent Paul Markonni of the Drug Enforcement Administration, who was on duty at the airport. Without disclosing his activities to Mrs. Griffin, Special Agent Markonni determined that the name on the suitcases was different from the name under which the ticket had been purchased, and he noted for future reference the description of the suitcases and of the woman passenger. He also alerted his colleagues in California to keep track of Mrs. Griffin on her arrival there, and he was informed by a reliable source that after arriving in California, Mrs. Griffin made immediate contact with people known to be involved in the narcotics trade.

Subsequently, law enforcement officers in California lost contact with Mrs. Griffin. Special Agent Markonni therefore asked to be notified by the airlines if a

person traveling under the name of Hood (the name under which the ticket to California had been purchased) should return by air to Detroit. He was notified that such a passenger was on a flight back to Detroit sometime after midnight on June 15, 1975. Shortly after receiving that information, Special Agent Markonni observed Mrs. Griffin disembark from a Los Angeles flight in Detroit, carrying one suitcase. She was met at the gate by defendant Thomas Griffin, whom she embraced. Markonni observed her then go into a ladies restroom. At the same time, he observed defendant Linda Jackson, who had also been at the gate but who had not met anyone, enter the ladies restroom. The Griffins then proceeded together to a lounge where they sat down, while Linda Jackson entered the baggage claim area. Markonni recognized a suitcase in the baggage claim area that was of the same description as the second one that Mrs. Griffin had taken to California.

The Griffins then proceeded out of the terminal building with one suitcase, leaving Linda Jackson near the other bag that Markonni had identified as similar to Mrs. Griffin's second suitcase. They were observed to enter an automobile that had been parked near the terminal and begin to drive away. With the aid of two Wayne County Sheriff's Department officers, Markonni then arrested both the Griffins and Linda Jackson and seized the second suitcase from the possession of a skycap. The automobile the Griffins were in at the time of their arrest and both suitcases were subsequently searched. Narcotics were found in both the suitcase taken from the skycap and the car, and firearms were found in the car.

On the basis of those findings of fact, this Court concluded on the record that there was probable cause to arrest Antoinette Griffin, but that probable cause was lacking for the arrest of Thomas Griffin. The Court also found that there was a valid basis to arrest Linda Jackson, and that the seizure of the second suitcase was proper because there was probable cause to believe it contained contraband, and the exigencies of the situation made obtaining a search warrant impractical.

The Court reserved for further consideration the following three issues: (1) The legality of the use by the DEA agent of information obtained by the airport security X-ray procedures; (2) the legality of the search of the suitcase once it had been seized; and (3) the suppression of the evidence obtained through the search of the car.

The Initial Airport Search

The propriety of the security guard's passing on to the DEA information obtained through the X-ray machine was challenged only by defendant Linda Jackson. Linda Jackson was not present at the time of that search and has not been charged with possession of the evidence obtained as a result of that search. In *Brown v. United States*, 411 U.S. 223 (1973), the Supreme Court enunciated the rule that standing to contest the validity of a search is not present where the defendants

> "(a) were not on the premises at the time of the contested search and seizure; (b) alleged no proprietary or possessory interest in the premises; and (c) were not charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure." 411 U.S. at 229.

The Court quoted from *Alderman v. United States*, 394 U.S. 165, 174 (1969), that

> "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted. *Simmons v. United States*, 390 U.S. 377 (1968); *Jones v. United States*, 362 U.S. 257 (1960)."

Defendant Jackson thus lacks standing to assert the illegality of the search of Mrs. Griffin's bag. No objection to that search has been raised by Mrs. Griffin. Therefore, the propriety of the initial search and the passing on of the information thereby obtained by Special Agent Markonni need not be considered here.[4] Defendant Jackson's motion to suppress will be denied.

The Opening of the Suitcase

The case law is uniform in holding that it is proper to open containers such as suitcases seized incident to a valid arrest. *United States v. Frick*, 490 F.2d 666 (CA5 1973); *United States v. Burch*, 471 F.2d 1314 (CA6 1973); *United States v. Kaye*, 492 F.2d 744 (CA 6 1974); *United States v. Lugo-Baez* 412 F.2d 435 (CA8 1969); *United States v. Buckhonon*, 505 F.2d 1079 (CA8 1974); *United States v. Mehciz*, 437 F.2d 145 (CA9 1971); *United States v. Maynard*, 439 F.2d 1086 (CA9 1971); *United States v. Battle*, 510 F.2d 776 (CA D.C. 1975). The Sixth and

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[4] By basing the decision on the issue of standing, the Court is not suggesting that either the observation of the money or the use made of the information thus obtained was improper.

District of Columbia Circuits have held that the fact that the search is not contemporaneous with the arrest does not render the search improper, as long as the police would have had the right to search the suitcase at the time of the arrest. *United States v. Kaye*, supra, and *United States v. Battle*, supra.

The circumstances under which the search of a suitcase is proper as incident to an arrest and seizure were set out by the Sixth Circuit in *United States v. Kaye*, supra. The court there held that, under *Chimel v. California*, 395 U.S. 752, 89 S. Ct. 2034, 23 L.Ed.2d 685 (1969), where the suitcase was within the arrestee's "immediate control", meaning the area from within which he or she might gain possession of a weapon or destructible evidence, the search would be proper both at the time of the arrest and subsequently. The *Kaye* court relied on *United States v. Robinson*, 414 U.S. 218 (1973):

> "It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment, 414 U.S. 218, 235, 94 S. Ct. 467, 477, 38 L.Ed.2d 427 (1973)." 492 F.2d 744, 746.

Reading those two cases together, the *Kaye* court relied for authority for both the seizure and the search of the suitcase on an exception to the warrant requirement arising out of the necessity for the arresting officers to secure weapons and evidence that might be within the control of the arrestee. This exception to the warrant requirement is apparently not subject to the same

strictures which have troubled other courts in the context of warrantless searches conducted under other exceptions to the warrant requirement. For example, the Fifth and Second Circuits have considered whether the scope of the so-called "exigent circumstances" exception is limited by the nature of the exigent circumstances which in a particular case create the exception to the seizure of the article, without automatically extending to a search of the article seized. The Fifth Circuit, in a line of recent cases, considered whether exigent circumstances sufficient to authorize a warrantless seizure of suitcases can also authorize the warrantless search of the suitcases. *United States v. Garay*, 477 F.2d 1306 (CA5 1973); *United States v. Lonabaugh*, 494 F.2d 1257 (CA5 1973); and *United States v. Anderson*, 500 F.2d 1311 (CA5 1973), all held that where the seizure of the suitcase was separate in space from but contemporaneous with the arrest of the defendant, the exigencies permitting the warrantless seizure would not permit the officers to conduct a warrantless search, since the officers had control of the suitcases, and their contents were no longer subject to any potential action by the defendant. Subsequent to those cases, the Fifth Circuit held en banc that where immediate seizure of the bags in order to prevent the defendant from destroying potential evidence, the warrantless opening of the bags is also authorized on the ground that such a search is no greater an intrusion of the defendant's Fourth Amendment rights than a seizure followed by the securing of a search warrant from the magistrate. *United Staetes v. Hand*, 516 F.2d 472, 476 (CA5 1975). The *Garay*, *Lonabaugh*, and *Anderson* decisions were distinguished in *Hand* on the basis that in those cases the defendants were in custody at the time of

the seizure of the suitcases, and the suitcases were in the secure control of the authorities, whereas in *Hand* the defendant was still at large and still had some potential control over the possessory interest in the bags. The potential mobility of the bags in *Hand* influenced the court to apply authority permitting the search of automobiles validly seized pursuant to an arrest, also on the theory that such a procedure creates no greater an intrusion than seizure pending the securing of a warrant for the search of the car, citing *Chambers v. Maroney*, 399 U.S. 42, 90 S. Ct. 1975, 26 L.Ed.2d 419 (1970).

In *United States v. Johnson*, 467 F.2d 630 (CA2 1972), the Second Circuit held that in the context of a search for weapons conducted while the police were in hot pursuance of the defendant, it was permissible to open a suitcase for which there was probable cause to believe that there were guns inside. Again, the court explained that suitcases were similar to automobiles in terms of their mobility, and thus the exigent circumstances extended to the search as well as the seizure of the article.

The need to find authorization for the warrantless search once the seizure has been made has not been recognized by the courts that have considered this problem, where the initial seizure of the suitcase was, as in the instant case, incident to an arrest under *Chimel v. California*. In this case the suitcase was seized contemporaneously with the arrest of Linda Jackson, and it was taken from the area within her physical control, albeit not from her own hands. On the authority of *Kaye*, the search of the suitcase as well as its seizure must be upheld. The motion to suppress the evidence thus obtained will therefore be denied.

The Search of the Car

Warrantless automobile searches are authorized as incident to a valid arrest, *Chimel v. California*, supra, or where there is probable cause to believe the automobile contains contraband. *Chambers v. Maroney*, supra. In this case both the occupants of the automobile were arrested, one validly and one invalidly. The car was then searched. Thomas Griffin, the defendant against whom the evidence thus obtained is relevant, challenges the admissibility of the fruits of that search on the basis of the illegality of his arrest. In its simplest form, the problem is whether evidence seized pursuant to both an invalid arrest, and a valid arrest plus probable cause to believe there was contraband present, is admissible against the party invalidly arrested.[5]

The exclusionary rule for evidence illegally seized has developed as the primary means of implementing the Fourth Amendment protections against unreasonable searches and seizures and Fifth Amendment protections

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[5] At the outset this case must be distinguished from instances in which the police attempt to validate an otherwise invalid seizure by improperly extending the scope of an otherwise valid seizure. There is no evidence here that the arrest of Antoinette Griffin was made for the purpose of obtaining the evidence against Thomas Griffin. The police were mistaken in their assessment of the probable cause present with regard to Thomas Griffin, but nothing in the record indicates anything more than misjudgment with respect to him. Once the decision to arrest both the Griffins had in good faith been made, the search of the automobile proceeded as a natural consequence of the joint arrest.

against self-incrimination. In the ordinary course, evidence seized pursuant to an invalid arrest is suppressed as the only workable sanction against the illegality of the arrest. Two principal interests are cited by the courts with respect to the exclusionary rule: The deterrence of improper police conduct; and the safeguarding of judicial integrity by not permitting the courts to be party to the use of the fruits of an invasion of constitutional rights. *Terry v. Ohio*, 392 U.S. 1 (1968).

Many cases deal with the question of admissibility of evidence where, with respect to a single defendant, there is a taint of illegality, but also an independent valid authorization for the seizure of the evidence. For example, where a coerced confession provides the initial lead in the case, its taint with respect to subsequently discovered evidence can be overcome where the discovery of the further evidence is through the use of independent sources rather than through the exploitation of the primary illegality. *Wong Sun v. United States*, 371 U.S. 471 (1963). Thus, the fact of an invasion of the defendant's constitutional rights does not require exclusion of the evidence where the evidence sought to be introduced is not the "fruit of the poisonous tree". In *Silverthorne Lumber Co v. United States*, 251 U.S. 385 (1920), the seminal case on the "fruits" doctrine, after noting that:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall be used before the Court but that it shall not be used at all." 251 U.S. at 392;

the Court added:

> "Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed." Id.

Similarly, where the causal connection between the illegally obtained evidence and the proposed proof is sufficiently attenuated, even absent an independent source the proof has been held admissible under the doctrine of "attenuation". *Nardone v. United States*, 308 U.S. 338 (1939). Again, the invasion of a constitutional right does not require the exclusionary sanction where the connection between the constitutional infringement and the evidence sought to be introduced is sufficiently indirect.

Two recent decisions further illustrate the principle of admissibility of evidence obtained via two routes, one of which was legal, and the other illegal with respect to a single defendant. In *United States v. Boisvert*, USAF Ct. Mil. Rev. 3/2/76, reported at 18 Cr. L. 2571, 3/31/76, an illegal seizure of the defendant's car keys without advising him of his rights or permitting him to consult an attorney was found not to require exclusion of the evidence of narcotics subsequently seized from the car because probable cause to search the car arose independently when a specially trained security dog alerted the officers to the presence of narcotics in the car. The court held that by turning over the keys the defendant had in fact merely facilitated what would have happened anyway.

In *Roberts v. Ternullo*, U.S.D.C., E. N.Y., 1/7/76, reported at 18 Cr.L. 2415, documents which were

elsewhere filed as public records were illegally seized. A motion to suppress was denied because the records would undoubtedly have been uncovered independently in the course of the massive investigation being undertaken.

In our case, rather than having one instance of illegal police conduct followed by an independent source leading to the same evidence, we have an illegal police act with respect to one defendant, concurrent with a legal act with respect to a second defendant, both of which acts lead to the discovery of the same body of evidence. At the same time there is also probable cause, independent of the presence of the two defendants, to believe that the car contained contraband.

The element of concurrence of the legal and the illegal acts is really not the factor which distinguishes this case from the authority cited above. Rather, it is the fact that two people are involved that causes the difficulty in those circumstances. If Thomas Griffin had been arrested alone in the car, and if no other valid reason to search the car had existed, then he would have had a clear right to suppress the evidence thus obtained. Why should the fact that Antoinette Griffin's Fourth Amendment rights were not violated by *her* arrest have any effect on the vindication via the exclusionary rule of Thomas Griffin's rights? The converse would not be true, *viz.* that as to Antoinette Griffin evidence seized in violation of Thomas Griffin's rights would be excludable. The Fourth Amendment creates personal rights that are enforceable only by the party whose rights have been violated. *Brown v. United States*, supra.

The answer seems to lie in the peculiar nature of the exclusionary rule. The rule represents not a simple means of vindicating Fourth Amendment rights by letting the

wrongdoer go free because the constable has blundered. *Mapp v. Ohio*, 367 U.S. 643, 659 (1961), but a much more complex balancing of the conflicting public interests in deterring illegal police conduct, protecting the integrity of the courts, and encouraging effective investigation and apprehension of criminal conduct. In *Harrison v. United States*, 392 U.S. 219 (1968), the Supreme Court in passing noted the way this balancing works in the simpler context of the exclusion of the fruits of an illegal confession. The Court noted:

> "The exclusion of an illegally procured confession and of any testimony obtained in its wake deprives the Government of nothing to which it has any lawful claim and creates no impediment to legitimate methods of investigating and prosecuting crime. On the contrary, the exclusion of evidence causally linked to the Government's illegal activity no more than restores the situation that would have prevailed if the Government had itself obeyed the law." 392 U.S. 219, n. 10.

Where, as here, the evidence sought to be introduced would have been available to the government regardless of the illegality with respect to Thomas Griffin, the exclusion of the evidence would deprive the government of evidence to which it does have a lawful claim, and it would upset the balance of interests adopted by the *Harrison* court.

Thomas Griffin's motion to suppress the evidence seized from the automobile must therefore be denied.

/s/ JAMES P. CHURCHILL
United States District Judge

Dated: May 20, 1976

APPENDIX B

ORDER

(United States Court of Appeals
For the Sixth Circuit)

(Filed November 7, 1977)

United States of America, Plaintiff-Appellee v. Antoinette Louise Griffin (77-5151), Thomas Biggs Griffin, III (77-5152), Defendants-Appellants

Before: Peck and Engel, Circuit Judges and Duncan, District Judge.*

Thomas Biggs Griffin and Antoinette Louise Griffin jointly appeal from their convictions by a jury. Both appellants were found guilty under counts one and two of the indictment for violating 21 U.S.C. §841(a) (1) and 18 U.S.C. §2. The jury further found Thomas Griffin guilty of four additional counts involving two violations of 21 U.S.C. §924(c) (2) and 18 U.S.C. §1202(a) (1).

Contrary to the assertions of the appellants before this court, upon a review of the record, we agree with the trial court that the officers had probable cause to arrest Antoinette Griffin. We further agree that the officers acted reasonably in searching the Continental automobile and the baggage seized in the airport, even though the officers did not act pursuant to a warrant. The trial court consequently did not err in admitting into evidence the

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* Honorable Robert Duncan, Judge, United States District Court for the Southern District of Ohio, sitting by designation.

Lugar pistol, the contents of both the wallet and the overnight case, seized in a search of the automobile. The court also properly admitted the contents of the gold folding bag seized in the baggage claim area. We find it unnecessary to decide whether the district court erred in deciding that the officers lacked probable cause to arrest the defendant Thomas Griffin, it appearing from the record that the evidence introduced against him at trial was lawfully procured incident to the valid arrests of Antoinette Griffin and Linda Jackson, a codefendant whom the jury acquitted. The trial court therefore did not err in overruling the appellants' motion to suppress evidence.

Finally, we reject the appellants' contention that the evidence was insufficient to sustain their convictions because neither appellant was connected with the items introduced into evidence at trial. Upon a review of the record, we find that the evidence at trial was sufficient to sustain the verdicts as to each count and that the evidence sufficiently connected both appellants to the items seized by law enforcement officers.

More specifically, we find the appellants' contention that the facts of this case are controlled by *United States v. Chadwick*, 97 S. Ct. 2476 (1977) , to be without merit. We note that the search of the automobile was made contemporaneous with the custodial arrests of Antoinette Griffin and Linda Jackson, unlike the search in *Chadwick*. The search in the instant case did not take place in the relative security of a federal building, as in *Chadwick*, but rather occurred outdoors on the premises of a busy metropolitan airport. Under these circumstances, where an automobile search is not remote in time nor place to an arrest, the officers may properly search the automobile without first obtaining a warrant. *Carroll v. United States*, 267 U.S. 132 (1925). Accordingly,

IT IS ORDERED that the judgment of the district court be and it is hereby affirmed.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

APPENDIX C

ORDER

(United States Court of Appeals
for the Sixth Circuit)

United States of America, Plaintiff-Appellee v. Antoinette L. Griffin and Thomas Biggs Griffin, Defendants-Appellants.

Before: Peck and Engel, Circuit Judges and Duncan, District Judge*

No judge in regular active service of the court having requested a vote on the suggestion for a rehearing en banc, the petition for rehearing filed herein by the defendants-appellants has been referred to the panel which heard the original appeal. Upon consideration of said petition, the court concludes that it is without merit.

Accordingly, the petition for rehearing is hereby denied.

ENTERED BY ORDER OF THE COURT
/s/ John P. Hehman, Clerk

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* Honorable Robert M. Duncan, Judge, United States District Court for the Southern District of Ohio, sitting by designation.

APPENDIX D

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

(Supreme Court of the United States)

(Antoinette L. Griffin, et al., Petitioners, v. United States)

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 10, 1978.

/s/ Potter Stewart
Associate Justice of the Supreme
Court of the United States

Dated this 10th
day of January, 1978

No. 77-1128

In the Supreme Court of the United States

OCTOBER TERM, 1977

THOMAS BIGGS GRIFFIN III and
ANTOINETTE LOUISE GRIFFIN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is not yet reported. The opinion of the district court (Pet. App. A) is reported at 413 F.Supp. 178.

JURISDICTION

The judgment of the court of appeals was entered on November 7, 1977. A petition for rehearing was denied on December 12, 1977 (Pet. App. C). On

January 10, 1978, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including February 10, 1978 (Pet. App. D), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the warrantless search of a garment bag and of petitioners' automobile violated the Fourth Amendment.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner Antoinette Griffin was convicted on two counts of possession of heroin and cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2 (Pet. App. 25). Petitioner Thomas Griffin was convicted at the same trial on four counts of possession of heroin and cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2; of carrying a firearm during the commission of a felony, in violation of 18 U.S.C. 924(c)(2); and of possession of a firearm by a convicted felon, in violation of 18 U.S.C. App. 1202(a)(1).[1] Antoinette Griffin was sentenced to concurrent

[1] Thomas Griffin was acquitted on another count of possession of heroin with intent to distribute, in violation of 21 U.S.C. 841(a)(1). Co-defendant Linda Rue Jackson was acquitted on Counts 1 and 2, charging possession of heroin and cocaine, respectively, with intent to distribute, in violation of 21 U.S.C. 841(a)(1) (see Pet. 5).

terms of five years' imprisonment on each count. Thomas Griffin was sentenced to concurrent terms totaling ten years' imprisonment and three years' special parole on the possession charges and on the charge of violating Section 1202(a)(1), plus a consecutive term of two years' imprisonment on the charge of violating Section 924(c)(2). The court of appeals affirmed (Pet. App. B).

The evidence showed that on June 12, 1975, Antoinette Griffin entered a security checkpoint at the Detroit Metropolitan Airport with a gold garment bag and a gold tote bag (S.H. 29; Tr. 48-49, 87).[2] When an X-ray scan revealed a solid mass in the bottom of the tote bag, a security officer opened the bag and discovered a large sum of currency wrapped in a white towel (S.H. 29-30; Tr. 49-50, 53-58). The officer contacted Special Agent Paul Markonni of the Drug Enforcement Administration and described petitioner Antoinette Griffin and her luggage to him (S.H. 33, 59; Tr. 64, 87). Investigating further, Agent Markonni learned that the name on Antoinette Griffin's luggage was different from "M. Hood," the name in which her airline ticket had been purchased (S.H. 59-61; Tr. 89-90). After Antoinette Griffin boarded a flight to Los Angeles, Agent Markonni made arrangements for surveillance of her in California (S.H. 62; Tr. 93). Upon arrival there, she was observed being met by five known narcotics traffickers (S.H. 63).

[2] "S.H." refers to the transcript of the suppression hearing.

At approximately 12:30 a.m. on June 15, 1975, Agent Markonni was alerted by American Airlines that a "V. Hood" was scheduled to return to Detroit from Los Angeles early that morning (S.H. 69-70). Accordingly, Agent Markonni and two officers went to the airport, where they observed petitioner Thomas Griffin and co-defendant Linda Jackson in the gate area where the Los Angeles flight was to arrive (S.H. 71-73; Tr. 102-103). At about 3:10 a.m., petitioner Antoinette Griffin disembarked (S.H. 73; Tr. 103, 105). After briefly embracing Thomas Griffin, she entered a nearby restroom, as did Jackson (S.H. 74; Tr. 103-104).[3] Several minutes later, Antoinette Griffin rejoined Thomas Griffin, and together they went to another area of the terminal (S.H. 75, 81; Tr. 104-105).

Meanwhile, Jackson proceeded from the restroom to the baggage claim area (S.H. 81-83; Tr. 106-107). Agent Markonni observed among the luggage from the Los Angeles flight a gold garment carrier that appeared to be the same as the one taken to California by Antoinette Griffin; none of the other baggage was similar (S.H. 85; Tr. 107). The bag was retrieved and placed on a cart by a skycap who spoke with Jackson (S.H. 85-86; Tr. 107-108). Agent Markonni thereupon directed an officer to maintain surveillance of Jackson, while he and the other officer looked for petitioners, who, in the meantime,

[3] Although Jackson had been in the gate area when petitioner Antoinette Griffin's flight arrived, she did not meet any incoming passengers (S.H. 141-142).

had left the terminal (S.H. 86; Tr. 109). Agent Markonni apprehended petitioners in an automobile as they attempted to drive away (S.H. 87; Tr. 110-112), and he escorted them back into the terminal (S.H. 88; Tr. 112-113). Once inside, Agent Markonni approached Jackson, identified himself, and seized the clothing bag from the skycap's cart, which was approximately five feet away from Jackson (S.H. 89, 163; Tr. 113). The skycap stated that Jackson had given him the claim check for the bag (S.H. 166-169). Petitioners and Jackson were then taken into an office behind the baggage area, where Agent Markonni opened the garment bag and found substantial quantities of heroin and cocaine (S.H. 90-91; Tr. 114-116, 450-452). Shortly thereafter petitioners' automobile, which had been moved to the airport parking lot, was searched (S.H. 93; Tr. 248). Concealed underneath the front seat were a pistol and a wallet containing cocaine and heroin (S.H. 93; Tr. 180-181, 187, 249-250, 315-316, 461-463).[4] Heroin was also discovered in an unlocked suitcase on the rear seat of the vehicle (S.H. 93; Tr. 164, 336, 458-459).

ARGUMENT

Petitioners contend (Pet. 6) that there was no probable cause to arrest Linda Jackson or to be-

[4] The wallet also contained identification of Thomas Griffin (G. Exh. 11-A). Thomas Griffin was a convicted felon and not licensed to carry the firearm, which was manufactured outside the State of Michigan (G. Exhs. 13-15).

lieve that the automobile contained contraband (Pet. 9). They also contend that even assuming the existence of probable cause, the warrantless searches of the garment bag and of the automobile and its contents were invalid under *United States* v. *Chadwick*, 433 U.S. 1.

After a thorough review of the record, the district court concluded that Agent Markonni had probable cause to arrest Antoinette Griffin and Jackson and to believe that narcotics would be found in both the garment bag and the automobile[5] (S.H. 181-185; Pet. App. 15, 20), and the court of appeals affirmed (Pet. App. 25-26). There is no reason for further review by the Court.

1. The arresting agent knew that petitioner Antoinette Griffin, who was carrying a very large sum of money in her luggage, had made a short trip to Los Angeles, which he knew to be a principal point of distribution for illicit narcotics that had been coming into Detroit, and had been met in Los Angeles by known narcotics traffickers (S.H. 54). He knew that the name on petitioner's luggage did not match the name in which her ticket had been purchased. Immediately after she returned to Detroit she entered a restroom. Jackson, who had been at the gate when the flight arrived at about 3:00 a.m. but had

[5] The court found that while Agent Markonni initially lacked probable cause to arrest Thomas Griffin (S.H. 182), all the evidence admitted against him had been seized pursuant to the valid arrests of Antoinette Griffin and Jackson and the lawful search of the automobile (Pet. App. 20-24).

met no passengers, entered the restroom simultaneously. Jackson then proceeded to the baggage claim area, and Antoinette Griffin rejoined Thomas Griffin, with whom she left the area. At the claim area, Jackson had a conversation with a skycap, who then retrieved a gold garment bag—the only one of its kind among the luggage from the Los Angeles flight—that appeared to be the same as the one taken to Los Angeles by Antoinette Griffin. At approximately that time, petitioners left the terminal. As the district court described the situation (S.H. 181):

> It has all of the earmarks of a typical mule operation right then and there, no question about it.
>
> * * * * *
>
> On the overall picture [Agent Markonni] had every reason to believe and he had probable cause to believe that [petitioner Antoinette Griffin] left Detroit with a large sum of money to purchase narcotics, that she came back with the narcotics and there was a very, very subtle effort to pass her suitcase probably containing narcotics on to [Jackson] with whom she was working in concert and whom she had contact or at least the possibility of contact within the privacy of the ladies' room.

In these circumstances, Agent Markonni had exceptionally strong probable cause to believe that petitioner Antoinette Griffin had obtained narcotics in California and then made a delivery to Linda Jackson at the airport. This being so, it followed that illicit drugs would likely be found in the gold garment

bag, as well as in the automobile in which Antoinette Griffin had attempted to leave the airport. Agent Markonni thus had probable cause to arrest Jackson, and the search of the garment bag was properly made incident to that arrest. Additionally, the trial court properly determined that the subsequent warrantless search of the automobile was also constitutionally permissible, since the officers had probable cause to believe that it contained contraband.

2. Nothing decided in *United States* v. *Chadwick*, *supra*, requires a different result. In *Chadwick*, this Court held that federal law enforcement agents who had arrested several suspects, seized a locked footlocker, and transported it to the agents' offices, were constitutionally required to obtain a warrant before searching its contents. The Court concluded that once the agents had seized the locker, gained "exclusive dominion" over it, and arrested its owner, there was no exigency requiring an immediate search, nor was any other recognized exception to the warrant requirement applicable, and a warrantless search was therefore unreasonable (433 U.S. at 11-16).

a. *Chadwick* did not purport, however, to alter the settled Fourth Amendment rule permitting warrantless searches of the arrestee and of the area within his immediate control incident to a custodial arrest. See *United States* v. *Edwards*, 415 U.S. 800, 802-803; *United States* v. *Robinson*, 414 U.S. 218, 236; *Chimel* v. *California*, 395 U.S. 752, 763; *Abel* v. *United States*, 362 U.S. 217, 239; *Draper* v. *United States*, 358 U.S. 307, 314. On the contrary, the Court

observed in *Chadwick* that "[w]hen a custodial arrest is made, there is always some danger that the person arrested may seek to use a weapon, or that evidence may be concealed or destroyed" (433 U.S. at 14), and it recognized that "[t]he potential dangers lurking in all custodial arrests make warrantless searches of items within the 'immediate control' area reasonable without requiring the arresting officer to calculate the probability that weapons or destructible evidence may be involved" (*id.* at 14-15). Here the garment bag, which was not locked, was within the area of Jackson's immediate control; although the bag was on the skycap's cart, it was no more than five feet from Jackson and readily accessible to her (S.H. 161, 163). The bag was searched as soon as the officers escorted Jackson and petitioners to an office behind the baggage area, moments after Jackson was arrested. Accordingly, the search was properly conducted without a warrant as an incident to and essentially contemporaneous with Jackson's arrest. See *United States* v. *Lewis*, 556 F.2d 385, 388 (C.A. 6), certiorari denied, No. 77-431, January 9, 1978; *United States* v. *Gill*, 555 F.2d 597, 599 (C.A. 6); *United States* v. *Prince*, 548 F.2d 164, 165 (C.A. 6); *United States* v. *Giles*, 536 F.2d 136 (C.A. 6); *United States* v. *Cepulonis*, 530 F.2d 238, 242 (C.A. 1), certiorari denied, 426 U.S. 908; *United States* v. *Eatherton*, 519 F.2d 603, 610 (C.A. 1), certiorari denied, 423 U.S. 987; *United States* v. *Frick*, 490 F.2d 666, 669-670 (C.A. 5), certiorari denied *sub nom. Petersen* v. *United States*, 419 U.S. 831; *United*

States v. *Mehciz*, 437 F.2d 145, 146-148 (C.A. 9), certiorari denied, 402 U.S. 974.[6]

b. Nor is there anything in *Chadwick* that would invalidate the search of the automobile and its contents in this case. Indeed, *Chadwick* itself reaffirmed that this Court has long "recognized significant differences between motor vehicles and other property which permit warrantless searches of automobiles in circumstances in which warrantless searches would not be reasonable in other contexts." 433 U.S. at 12. Although this distinction "has been based in part on [an automobile's] inherent mobility, which often makes obtaining a judicial warrant impracticable," it has also been based upon "the diminished expectation of privacy which surrounds the automobile" (*ibid.*).

Unlike the instant case, *Chadwick* did not involve the automobile exception to the warrant requirement.[7] There the search of the double-locked footlocker was conducted at the offices of the Drug Enforcement Administration an hour and a half after the defendants had been arrested elsewhere for possession of

[6] Petitioners contend (Pet. 8) that the decision below conflicts with *United States* v. *Berry*, 560 F.2d 861 (C.A. 7), which held that the warrantless search of a briefcase carried by an arrestee was invalid under *Chadwick*. That decision, however, has been vacated as improvidently rendered (C.A. 7, No. 76-2014, decided January 31, 1978). The court on reconsideration affirmed the conviction, ruling that *Chadwick* would not be accorded retroactive effect.

[7] As the Court noted, the government did not contend that "the footlocker's brief contact with Chadwick's car makes this an automobile search * * *." 433 U.S. at 11.

contraband. At the time of the search, the footlocker was securely in the exclusive control of the law enforcement officers, and it was conceded that there was "no risk that whatever was contained in the footlocker trunk would be removed by the defendants or their associates." 433 U.S. at 4. Here, as the court of appeals noted (Pet. App. 27), the search of the petitioners' automobile and the unlocked suitcase on the rear seat "did not take place in the relative security of a federal building, as in *Chadwick*, but rather occurred outdoors on the premises of a busy metropolitan airport" approximately an hour after petitioners' arrest (Tr. 254-255, 283-288). Although the vehicle had been moved from the street to a parking lot and locked (Tr. 277-279, 283-285), the parking lot was accessible to the public (Tr. 255-256, 288-289). In these circumstances, it was reasonable for the officers to conduct a probable cause search without a warrant. *Chambers* v. *Maroney*, 399 U.S. 42, 48-52.

c. Even if *Chadwick* were deemed to alter prior law relating to searches incident to arrest and automobile searches, it should not be given retroactive application to searches occurring prior to the time it was decided. Three Circuits have already so held. See *United States* v. *Berry*, *supra*, slip. op. 2-3; *United States* v. *Reda*, 563 F.2d 510, 512 (C.A. 2), pending on a petition for a writ of certiorari, No. 77-5995; *United States* v. *Montgomery*, 558 F. 2d 311, 312 (C.A. 5), certiorari denied, No. 77-5205, October 31, 1977. These cases are wholly consistent

with the approach this Court has taken to the retroactivity of Fourth Amendment rulings generally. See, *e.g.*, *United States* v. *Peltier*, 422 U.S. 531; *Williams* v. *United States*, 401 U.S. 646, 653-655.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1978.

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